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June 30, 2010

VIA HAND DELIVERY

Honorable Chief Justice Ronald M. George
and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: S183411 - *Professional Engineers in California Government v. Schwarzenegger*
California Attorneys, etc. v. Schwarzenegger
Service Employees International Union, Local 1000 v. Schwarzenegger

To the Honorable Chief Justice and the Associate Justices
of the California Supreme Court:

Defendant and appellant John Chiang respectfully provides the following reply brief in response to the Court's order dated June 9, 2010:

1. What effect, if any, does Government Code section 19996.22 – which provides in part that "[a]ny employee . . . who has been required, by the appointing power, . . . to involuntarily reduce his or her worktime contrary to the intent of this article . . . may file a grievance with the department" – have on the validity of the Governor's executive order instituting a mandatory furlough on state employees?

a. Section 19996.22 underscores the illegality of the Governor's furlough program.

In the Court below, the Governor argued that the Reduced Worktime Act supports his position because it demonstrates his "inherent authority as the [S]tate employer to establish varying schedules for state employees." (Respondents' Combined Br. in Response to Opening Briefs at 26.) The Governor has now replaced that

implausible position with the new argument that the Reduced Worktime Act "is inapposite to the issues before this Court." (Governor's Supplemental Letter Br. at 1.) The new argument is as misguided as the one it replaces.

The Governor focuses on the three words in the Reduced Worktime Act that authorize grievances by those who are coerced into "involuntary reductions in work hours '*contrary to the intent*' of the Reduced Worktime Act." (Governor's Supplemental Letter Br. at 5, quoting § 19996.22(a), emphasis added by the Governor.) He then seeks to define the intent of the Act in a way that does not foreclose involuntary furloughs. Specifically, he argues that the Act is intended only "to provide a means by which working parents and other caregivers can continue to provide service to the State while balancing the demands of their home life." (Governor's Supplemental Letter Br. at 5.) In a classic nonsequitur, the Governor then argues that the Reduced Worktime Act leaves the State free to force workers to reduce their worktime for any reason other than promoting work-life balance.

The Governor's argument nearly reduces section 19996.22 to a nullity. Under the Governor's interpretation, the only unlawful worktime reduction would be a coerced reduction that complicates a worker's efforts to balance work and family obligations. The far more reasonable interpretation of section 19996.22 accounts for the Act's emphasis on a worker's consent by allowing workers to file grievances whenever they are coerced into reducing their work hours, regardless of the qualitative effect that reduction has on their lives.

Furthermore, the Governor is wrong when he says that nothing in the Reduced Worktime Act indicates that the Legislature intended it to "constitute a restriction on the Governor's authority" to reduce worktimes "temporarily to address a fiscal emergency." (Governor's Supplemental Letter Br. at 5-6.) To the contrary, the Legislature expressly contemplated that the Act would be used in times of fiscal emergency by defining the extent to which the State could rely on reduced worktimes to address a significant workforce reduction of 1% or more in a single fiscal year. (*See* Gov. Code, § 19996.21(b).) Faced with such a reduction,

> . . . the director may conduct or may direct each affected department or agency to conduct a survey of either all permanent full-time employees or those permanent full-time employees most likely to be affected by the personnel reduction. The purpose of the survey shall be to determine

> the extent of the desire of employees to participate in voluntary reduced worktime. . . .
>
> (*Id.*)

In other words, even when contemplating the need to substantially reduce the State workforce, the Legislature authorized only *voluntary* worktime reductions. The Legislature's decision not to separately authorize involuntary reduced worktimes cannot be dismissed under the ordinary rules of statutory construction. To the contrary, the decision "clearly suggests application of the familiar maxim of statutory construction that the expression of one thing in a statute implies the exclusion of the omitted thing." (*County of Madera v. Super. Ct. of Madera County* (1974) 39 Cal.App.3d 665, 670.) Furthermore, if the State already had the authority to unilaterally and uniformly force its workforce into reduced work hours in response to a workforce reduction, the Legislature would have had no need to expressly authorize a survey "to determine the extent of the desire of employees to participate in voluntary reduced worktime." (Gov. Code, § 19996.21(b).)

b. The Governor has no inherent authority to impose furloughs on State employees.

The Governor tries to justify his furlough program by citing various statutes and article V, section 1 of the Constitution, which he claims vest him with sufficient executive authority to enable him to manage the State's finances and workforce as he alone sees fit. (Governor's Supplemental Letter Br. at 6.) The Governor vastly overstates his constitutional power.[1]

It is a fundamental principle of California constitutional law that "the entire law-making authority of the state, except the people's right of initiative and referendum, is vested in the Legislature, and that body may exercise any and all legislative powers which are not expressly or by necessary implication denied to it by the Constitution." (*State Personnel Bd. v. Dept. of Personnel Admin.* (2005) 37 Cal.4th 512, 523.) As a consequence of this broadly conferred power, "all intendments favor the exercise of the Legislature's plenary authority." (*Id.*)

[1] The Controller addresses this argument in greater depth in his Opening Brief on the Merits filed in the California Supreme Court on June 9, 2010, in *California Attorneys, etc. v. Schwarzenegger*, Case No. S182581, at pages 2-14.

The Legislature has exercised that plenary authority over state employment. (*See Miller v. State* (1977) 18 Cal.3d 808, 813-814 and cases cited therein ["it is well settled in California that public employment is not held by contract but by statute"].) In particular, the Legislature has enacted various statutes that prohibit the unilateral imposition of furloughs, as discussed extensively in the Controller's other briefs. (*See* Gov. Code, §§ 19851, 19996.22, 11020, 19826.) Once those statutes were passed by the Legislature and signed into law by the Governor, they became "binding upon all the executive officers of the state." (*Lukens v. Nye* (1909) 156 Cal. 498, 504.) This means, of course, that the Governor is not free to exercise his executive authority in a way that is foreclosed by those statutes.

A fiscal emergency does not provide an exception to these fundamental principles of constitutional law. Instead, article IV, section 10 of the Constitution expressly defines and limits the Governor's authority in a fiscal emergency. He may declare a fiscal emergency, call the Legislature into special session, and submit proposed legislation directly to the Legislature. (Cal. Const., art. IV, § 10(f)(1).) However, the Legislature is not obligated to adopt the Governor's proposals, and the Governor is not empowered to substitute his solutions for those conceived by the Legislature. Under article IV, section 10, it is the Legislature, and the Legislature alone, that is ultimately responsible for crafting a response to a fiscal emergency. If the Legislature fails to act to resolve the fiscal crisis within 45 days, it is prohibited from acting on other bills or adjourning for recess. (*Id.*, art. IV, § 10(f)(2).) At no point does the Constitution authorize the Governor to usurp the Legislature's legislative role.

The authorities cited by the Governor do not change this analysis. (Governor's Supplemental Letter Br. at 14-16.) The question presented in *Spear v. Reeves* (1906) 148 Cal. 501 was whether the Governor could designate which executive branch officer would carry out the constitutional obligation to publish the text of an initiative measure in the state's newspapers prior to an election, given that the Legislature had declined to make the designation. (*Id.* at 504-505.) In other words, the Constitution established the duty to publish newspaper notice, and the question was whether the Governor or the Legislature should decide which executive officer would carry out that duty. The *Spears* opinion does not suggest that the Constitution expressly delegated that decision either to the Legislature or the Governor, nor does it suggest that the Governor's chosen means for executing that duty violated other laws. Here, by contrast, the Constitution expressly delegates to the Legislature rather than the Governor the duty to determine how to bring the budget back into balance. (Cal. Const., art. IV, § 10(f)(2).) And here, the Governor's furloughs do violate other laws, including Government Code sections 19851, 19996.22, 11020 and 19826.

In short, the *Spear* decision stands for the unremarkable proposition that some orders by a Governor may be valid in the absence of express statutory authority. (*Cf.* 63 Ops.Cal.Atty.Gen. 583 (1980) [1980 WL 96881, *1 (Cal. A.G. July 3, 1980)], citing *Spear v. Reeves* (1906) 148 Cal. 501, 504.) As recognized in the Attorney General opinion cited by the Governor, however, that rule has no effect on the principle at stake here, which is that no order by the Governor may "invade the province of the Legislature" by "amend[ing] the effect of, or . . . qualify[ing] the operation of existing legislation." (63 Ops.Cal.Atty.Gen. 583 [1980 WL 96881 at *2], citing *Lukens v. Nye* (1909) 156 Cal. 498, 503-504.)[2]

The Governor's decision to rely on *Youngstown Sheet & Tube Co. v. Sawyer* (1952) 343 U.S. 579, is a peculiar one, given that the Supreme Court there rejected an argument very much like that advanced by the Governor here. In ruling that the President had no authority to seize steel mills on the basis of his executive power, the Court relied on federal constitutional principles that also apply to the question of state constitutional law presented here:

> In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks are wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that "All legislative Powers herein granted shall be vested in a Congress of the United States . . . ."
>
> (*Id.* at 587-588.)

[2] The Attorney General Opinion cited by the Governor considered whether the Governor's executive order prohibiting state agencies from discriminating in state employment on the basis of sexual preference constituted "an improper infringement upon legislative authority" at a time when the Legislature had not expressly outlawed such discrimination. The Attorney General concluded that the order did not infringe upon legislative authority because it was an exercise of the Governor's statutory authority to "supervise the official conduct of all executive and ministerial officers," (63 Ops.Cal.Atty.Gen. 583 [1980 WL 96881 at *1] citing Gov. Code, § 12010), and because it was consistent with legislative requirements that personnel decisions be based on merit rather than factors unrelated to merit.

Thus, the fiscal crisis facing this Governor cannot justify the suspension of constitutional principles any more than did the crisis facing President Truman more than half a century ago.

c. There is no need to exhaust administrative remedies in any case involving furloughs.

There are many flaws in the Governor's argument that the failure by furloughed workers to exhaust section 19996.22's administrative remedy deprives this Court of jurisdiction over these cases. (Governor's Supplemental Letter Br. at 6-7.)

First, as pointed out in the Controller's Opening Supplemental Letter Brief, section 19996.22 does not require employees to file a grievance when they are forced to accept reduced work schedules. Section 19996.22, subdivision (a) provides only that such employees "*may* file a grievance." (Emphasis added.) This Court has already determined in a case cited by the Governor that a statute which provides that an individual "may" pursue an administrative remedy does not create an administrative requirement that the individual do so before pursuing relief in court. (*Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 499-500.) This is so because "the word 'may' ordinarily means just that. It does not mean 'must' or 'shall.'" (*Id.* at 499.) Thus furloughed workers had the right but not the obligation to file grievances before turning to the courts.

Second, as described in the Controller's Opening Supplemental Letter Brief, an aggrieved party need not exhaust his or her administrative remedies if doing so would be futile. (*See* Controller's Opening Supplemental Letter Br. at 2-3 and cases cited therein.) That exception applies here, where it is beyond dispute that DPA, the agency that ordered the furloughs in response to the Governor's executive order, would resolve those grievances against each and every furloughed worker.

Third, even if the exhaustion doctrine did apply here, the Governor has waived his right to raise it by failing to timely assert the defense in the courts below. The Governor tries to avoid that result by claiming that the failure to exhaust administrative remedies deprives a court of *subject matter* jurisdiction over a case. (Governor's Supplemental Letter Br. at 7.) It does no such thing, even in cases where the doctrine

applies.[3] The Governor relies on a 69-year old quotation suggesting that exhausting administrative remedies is a "jurisdictional prerequisite to resort to the courts." (*Sierra Club*, *supra*, 21 Cal.4th at 496, quoting *Abelleira v. District Ct. of Appeal* (1941) 17 Cal.2d 280, 293.) It is now well established, however, that the exhaustion requirement is "jurisdictional" only in the sense that a court's failure to apply the rule when the issue was properly raised could be corrected by the issuance of a writ of prohibition. (*See*, *e.g.*, *Green v. City of Oceanside* (1987) 194 Cal.App.3d 212, 222.) The exhaustion requirement is a procedural prerequisite only that does not implicate subject matter jurisdiction. (*See*, *e.g.*, *Holland v. Union Pacific Railroad Co.* (2007) 154 Cal.App.4th 940, 946.) Accordingly, like other procedural defenses, the exhaustion defense can be waived by the failure to assert it in a timely fashion. (*Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 135-136.) Here, the Governor never raised this defense in the trial court, or in the Court of Appeal. Consequently, he has waived his right to raise it now. (*People ex rel. DuFauchard v. U.S. Fin. Management, Inc.* (2009) 169 Cal.App.4th 1502, 1512; *Cummings v. Stanley* (2009) 177 Cal.App.4th 493, 505.)

Fourth, the Governor should be estopped from using the defense, even if he had not already waived it. It was, after all, the Governor who came to this Court asking it to transfer to itself seven separate appeals relating to furloughs and stay over a dozen of furlough-related challenges pending in the superior courts in order to avoid delays and inconsistent rulings from the various courts. (*See generally* Governor's Pet. to Transfer and Consolidate Appeals, filed in Cal. Supreme Ct. on Mar. 2, 2010.) The Governor must not be allowed to shift strategies now, after more than eighteen months of litigation, in favor of a futile administrative process that would needlessly delay resolution of an issue of great public importance.

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[3] The other cases cited by the Governor do not help him either. *Service Employees International Union, Local 1000 v. Dept. of Personnel Admin.* (2006) 142 Cal.App.4th 866 has nothing to do with this case, because it has nothing to do with waiver or futility. There, the defendant raised the exhaustion defense in the Superior Court, which the plaintiffs resisted on the grounds that any delay would impose irreparable constitutional injuries upon them. (*Id.* at 871; *see also id.* at 869 [collective bargaining agreements "*require[d]* the parties to attempt to settle their disputes informally"], emphasis added.) The Governor should not have cited *County of Sacramento v. AFSCME Local 146* (2008) 165 Cal.App.4th 401 [80 Cal.Rptr.3d 911], review granted Oct. 16, 2008, Case No. S166591 because this Court has granted review of that decision. (*See* Cal. Rules of Court, rules 976(d), 977(a).)

2. What effect, if any, does the provision of the revised 2008 Budget Act which reduced the appropriation for employee compensation for the 2008-09 fiscal year in an amount comparable to the savings sought to be achieved by the Governor's furlough order (Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 2, § 36 (SBX3 2, § 36), passed by the Legislature and approved by the Governor on Feb. 20, 2009) have on (1) the validity of the Governor's executive order, and/or (2) the remedy, if any, to which the petitioning labor organizations may be entitled in these actions?

a. Section 3.90 underscores the illegality of the Governor's furlough program.

The Governor seeks to draw far more significance from section 3.90 of the 2008 Budget Act than it can possibly yield.

The only point of agreement between the Controller and the Governor is that section 3.90 reduced the appropriations available for state employee compensation in an amount that was comparable to the savings the Governor sought to achieve through his furlough program. The Governor claims this reduced appropriation constitutes "legal authority" for his furloughs. (Governor's Supplemental Letter Br. at 11.) It does no such thing.

As set forth in the Controller's Opening Supplemental Letter Brief, section 3.90 could not as a matter of law have provided "legal authority" for furloughs without running afoul of the single subject rule. (Controller's Opening Supplemental Letter Br. at 6.) Nor is there a reasonable basis for concluding that the Legislature intended such an unlawful result, because that interpretation violates the rule of statutory construction that strongly disfavors implied repeals. (*Id.* at 6-7.)

The Governor's theory that section 3.90 "validates" his furloughs fares no better. According to this argument, section 3.90 demonstrates the Legislature's intent to acquiesce in the imposition of the Governor's furlough order and the ruling by the Sacramento Superior Court upholding that order. (PECG JA 660-672.)

Perhaps the greatest obstacle confronting the Governor's interpretation is the unavoidable fact that section 3.90 does not refer to furloughs or the Governor's executive order. Instead, it directs the Governor to achieve reductions through a method that flies in the face of the Governor's furlough order: collective bargaining. Section 3.90 states in relevant part:

> [E]ach item of appropriation in this act, . . . shall be reduced, as appropriate, to reflect a reduction in employee compensation *achieved through the collective bargaining process for represented employees* or through existing administration authority and a proportionate reduction for nonrepresented employees (utilizing existing authority of the administration to adjust compensation for nonrepresented employees) . . . .
>
> (b) *The Department of Personnel Administration shall transmit proposed memoranda of understanding to the Legislature promptly and shall include with each such transmission estimated savings pursuant to this section of each agreement.*
>
> (c) *Nothing in this section shall change or supersede the provisions of the Ralph C. Dills Act* . . . .
>
> (Stats. 2009, 3d Ex Sess. 2009-2010, ch. 2, § 36 (SBX3 2), § 36, emphasis added.)

The Governor seeks to dismiss the significance of the reference to collective bargaining by suggesting that the Legislature gave him the choice to achieve savings "'through the collective bargaining process for represented employees *or through existing administration authority.*'" (Governor's Supplemental Letter Br. at 9, citing Stats. 2009, 3d Ex Sess. 2009-2010, ch. 2, § 36 (SBX3 2), § 36, emphasis added by Governor.) But even if the Legislature had intended to give the Governor this choice, rather than intending that the State achieve savings "through the collective bargaining process for represented employees" or through "existing administration authority and a proportionate reduction for nonrepresented employees," the Governor's interpretation only begs the question of why the Legislature would bother referring to collective bargaining at all if it expected the savings would be achieved through other means.

Furthermore, the Governor's interpretation cannot be squared with the other provisions of section 3.90, which plainly require the State to respect the collective bargaining rights of represented workers. Subdivision (b) of section 3.90 requires the DPA to propose new MOUs without exception or qualification for "existing administration authority," and subdivision (c) reasserts the applicability of the Dills Act, again without exception or qualification. In other words, the Governor could not rely on "existing administration authority" that violated the Dills Act or without submitting proposed MOUs. These provisions further demonstrate the Legislature's intent to require

the State to bargain with its represented workforce rather than impose unilateral furloughs upon them.

Nor is there any reasonable basis to conclude that the Legislature had in mind the ruling by the Sacramento Superior Court upholding the Governor's furlough order when it used the phrase "existing administration authority." As a matter of law, the Legislature cannot be deemed to have "acquiesced" in a court's construction of a statute unless "the Legislature thereafter reenacts that statute without changing the interpretation put on that statute by the courts." (*People v. Bouzas* (1991) 53 Cal.3d 467, 475.) Here, the Superior Court based its ruling on Government Code sections 19851 and 19849. (PECG JA 660-672.) Because the Legislature has not reenacted either provision, the Legislature can hardly be said to have acquiesced in the court's construction.

Moreover, the Legislature can only be said to have acquiesced in the courts' construction of a statute after "a long period of uniform judicial or administrative treatment" during which "the Legislature has addressed the law in question on multiple occasions, yet has not disturbed the settled interpretation." (*Prachasaisoradej v. Ralphs Grocery Co., Inc.* (2007) 42 Cal.4th 217, 243; *see also Olson v. Automobile Club of Southern Cal.* (2008) 42 Cal.4th 1142, 1156 [no legislative acquiescence when Legislature fails to take any action following appellate decision regarding statutory provision.].) Here, there was a single Superior Court decision that was 21 days old and already on appeal at the time of section 3.90's enactment. It is no surprise that the Governor has failed to cite any authority suggesting that a Legislature can be said to "acquiesce" in a court's decision under the circumstances presented here.

In the final analysis, then, section 3.90 can be said to have done little more than acknowledge the factual realities and legal uncertainties that existed at the time of its enactment on February 20, 2009. By that time, the furloughs were newly underway, as were the three lawsuits now consolidated before this Court. One Superior Court had upheld the validity of the furloughs in a decision that had already been appealed by the Controller and all of the petitioning unions. (PECG JA 660-678; CASE JA 535-539; SEIU JA 1951-1966.) It was therefore clear that the furloughs were likely to remain in force for the foreseeable future while these and other cases worked their way through the courts, and the Legislature enacted a budget that reflected that fact. Yet far from endorsing the Governor's approach, the Legislature reiterated the Governor's obligation to bargain collectively with represented workers, and act within the boundaries of his

existing administration authority with respect to unrepresented workers.[4] In so doing, the Legislature confirmed the invalidity of the Governor's executive order.

b. Issues concerning remedies should be remanded for further briefing.

Because the Controller has taken the position that questions concerning remedies should be remanded to the courts below for further briefing, the Controller declines to respond to the Governor's arguments concerning section 3.90's effect on the remedies available to injured workers.

Respectfully submitted,

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RBJ:NL

[4] As described in the Controller's Opening Supplemental Letter Brief, the Governor's existing administration authority to reduce employee compensation costs has been defined by the courts through *Tirapelle v. Davis* (1993) 20 Cal.App.4th 1317. (Controller's Opening Supplemental Letter Br. at 5-6.) Specifically, that existing authority permits layoffs, hiring freezes, eliminating positions through attrition, requesting that employees take voluntary reductions in their hours of work, and for nonrepresented employees, reduced salary ranges. (*Id.*)

PROOF OF SERVICE

I, the undersigned, declare under penalty of perjury that:

I am a citizen of the United States, over the age of 18, and not a party to the within cause or action. My business address is 201 Dolores Avenue, San Leandro, CA 94577.

On June 30, 2010, I served a true copy of the following document(s):

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I declare, under penalty of perjury, that the foregoing is true and correct. Executed on June 30, 2010, in San Leandro, California.

Michael Narciso

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